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Hon. John L. Sampson
409 Legislative Office Building
Albany, NY 12247

Hon. Dean G. Skelos
315 Legislative Office Building
Albany, NY 12247

Dear Senators Sampson and Skelos:

I join my fellow District Attorneys across New York State in respectfully expressing firm opposition to six legislative proposals under consideration by the Senate (S. 7873 re: informants; S. 7893 re: discovery; S. 7867 re: DNA; S.7868 re: Court of Claims/expungement of criminal records; S. 7877 re: statements; and S.7842 re: identification evidence). The essential question that must be asked of any criminal justice proposal is, "Does it make us safer, and is it fair?" The answer as to these particular measures is a resounding, "No."

It is unfortunate that the bills in question are referred to as a "wrongful conviction" package. Although I have been talking about ways to ensure the integrity of New York state's convictions for several years, both in last year's campaign and since I became District Attorney in January, I cannot, unfortunately, support the proposed legislation. My opposition is based on the simple reason that the proposals would hamper law enforcement agencies across the state in their ongoing efforts and new initiatives to prevent wrongful convictions and, just as importantly, to protect victims of crimes and witnesses to crimes.

I am glad to have had the opportunity to discuss various criminal justice issues with you and your staffs in the past. From our conversations, I believe you will understand why I am particularly distressed about legislation that will impede various voluntary initiatives now being implemented by law enforcement agencies, such as my office's Conviction Integrity Program and the uniform eyewitness identification procedures jointly announced earlier this month by New York City Police Commissioner Raymond Kelly, the District Attorneys Association of New York, and other law enforcement officials across the state.

I, along with every other prosecutor, share the New York State Bar Association's ("NYSBA") commitment to reducing the risks of wrongful convictions, and have made this issue a top priority in the New York County District Attorney's Office. Earlier this spring, we put in place a path-breaking Conviction Integrity Program with several components. Under the leadership of a seasoned prosecutor, a committee of senior lawyers is developing protocols that take account of the circumstances in which wrongful convictions are most likely to occur. While we cannot eliminate entirely the possibility of convicting the wrong person for a crime, I believe that we can and must investigate and prosecute cases in a manner designed to minimize this risk. To that end, we are also developing office policies that allow for a thorough investigation of meaningful claims of actual innocence. To guide us in these efforts, we have assembled an outside Advisory Board, with wide-ranging expertise in the criminal justice system, including academics, a former Judge of the New York Court of Appeals, and prominent defense lawyers. We hope that this program may serve as a model for other prosecutor's offices, both state-wide and nationally. But it is a voluntary model that should be allowed to innovate and percolate. It should not be legislated.

In my view, this voluntary approach will allow us to protect the public, and to do our best to prevent the conviction of innocent people. The bills proposed by NYSBA, by comparison, would hamper law enforcement agencies across the state. I know that my colleagues in the District Attorney's Association of the State of New York ("DAASNY") have separately sent you a more comprehensive memorandum in opposition, but I wanted to set forth a few points on each of the bills.

S 7873, A 11089 (Duane, Titus) creates new rules of evidence for informant testimony. Unfortunately, the overly broad definition of "informant" perhaps inadvertently includes many types of victims who would be subject to exposure and heightened scrutiny. District Attorneys, for example, routinely help victims secure safe harbor, shelter their children, obtain transportation and food, and access other essential victim services. But under this bill's provision, these victims would be deemed "informants." Going even further than New York's stringent accomplice corroboration law, it would actually *preclude the testimony* of victims who receive <u>any</u> benefit. These individuals would also have their identities revealed too early in the criminal process, even if they never were to testify. The net result would be fewer victims of brutal crimes willing to cooperate, and more guilty defendants escaping punishment. This, in turn, would make the public less safe.

S 7893 (Hassell-Thompson) relates to the disclosure of exculpatory information, otherwise known as *Brady* material. The *Brady* decision currently requires that prosecutors turn over exculpatory materials, as does Rule 3.8 of the Rules of Professional Conduct. This proposal, among other things, imposes a rigid timeline along with sanctions against prosecutors and suppression of materials not turned over within 28 days of arraignment, in some instances, or more than 21 days before trial, in others. These provisions are intolerable in that they subject prosecutors to professional sanction even for good faith errors, and they ignore the plain fact that prosecutors rarely have full control over documents from all other agencies involved, much less the unfettered ability

to supply them within an unreasonably short time frame. Once again, although well-meaning, this provision would incentivize gamesmanship and jeopardize public safety. It would also adversely affect the ability of District Attorneys to recruit assistants, who would be opening themselves up to professional sanction for good faith errors.

S 7867, A 11123 (Schneiderman, Lavine) would allow an individual to demand a DNA test *after* pleading guilty, which would undermine the core principle of finality in the criminal justice system. As you know, our system typically incentivizes guilty parties to take responsibility for their actions, and in exchange for some leniency, the state is able to move on to other priorities and victims are able to find closure. Under this legislation, defendants would be able to plead guilty knowing that they can simply turn around, perhaps years later, and demand a DNA test that will not exclude them from the crime, but cannot conclusively link them to the crime, in the hope that reduced sentence they had been given would be vacated. Although I am strongly in favor of post-trial DNA testing for claims of innocence, and my office frequently consents to such testing, for the reasons stated I cannot support this bill.[1]

S 7868, A 11150 (Schneiderman, Lancman) provides remediation for individuals who were wrongfully convicted through no fault of their own. Like the DNA bill, this bill also runs counter to the goal of finality by allowing defendants who have pled guilty, free from coercion and given with due consideration from an able defense attorney, to seek remuneration. The bill would thus open up an entire new area in the Court of Claims, previously unknown, of defendants who have voluntarily pled guilty suing the state and potentially getting a windfall.

S 7877, A 5213 (Perkins, Lentol) requires audio and video recording of all custodial questioning of a defendant in all felony cases. Although I and other District Attorneys favor expanding the use of this procedure, it simply is not feasible as a statewide mandate. And, creating a requirement under the threat that unrecorded interrogations will be suppressed simply does not make sense and goes against the findings of the State Bar Task Force, which called for the continuation of voluntary pilot programs. That is exactly what is being done by NYPD and numerous upstate counties. To impose this unfunded requirement in our diverse state would also adversely affect public safety.

S 7842, A 11052 (Thompson, O'Donnell) seeks to codify a laundry-list of mandated identification procedures. As stated above, last month, DAASNY, the New York State and New York City Police, the Sheriff's Association, and the Division of Criminal Justice Services came together to announce voluntary improvements to our identification procedures. These groundbreaking suggested protocols, as to which police and prosecutors are already being trained, are designed to ensure that every identification procedure in our diverse state is conducted in a timely, fair and reliable manner. We have essentially already done what this legislation calls for; what we have *not* done is introduce a series of technicalities that increase the likelihood that a completely reliable

[1] I, however, strongly support the Governor's all-crimes DNA bill that will expand DNA collection to defendants convicted of any and all Penal Law crimes.

identification procedure can be excluded. Once again, this bill unreasonably jeopardizes public safety by elevating form over substance.

I am certain that the Senate's goal is to enhance justice throughout our state for all of those who are affected by our criminal laws. I strongly believe that passage of any of these bills will hinder and defeat efforts to better protect crime victims and witnesses to crimes, and to ensure fair prosecution of defendants.

Please feel free to call me at any time to discuss these issues further. I believe continued communication between legislators and law enforcement officials is invaluable to protecting the citizens of New York.

Very truly yours,

Cyrus R. Vance, Jr.

cc: Peter Kiernan, Esq.
Counsel to the Governor